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No. ~~357~~ 49

In the

Supreme Court of the United States

October Term, 1959

UNITED STATES OF AMERICA,
Petitioner

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AND APPENDIX FOR THE RESPONDENT IN OPPOSITION

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Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION*

OPINIONS BELOW

The judgment-order of the District Court (U. S. App. 178-188) is unreported and is printed in the Appendix hereto, *infra*, pages 13-20. The opinion of the Court of Appeals (Pet., App. 18-29) is reported at 270 F. 2d 707. Earlier opinions in this case are reported at 218 F. 2d 524;

* References to the Appendix to this brief are shown as "App.," to the Appendix to the petition as "Pet. App.," and to the appendices filed in the court below: the Appendix for the United States as "U. S. App." and the Appendix for Virginia Electric and Power Company as "Vepco App.," followed by the appropriate page number.
All emphasis in this brief has been added unless otherwise indicated.

judgment vacated and case remanded at 350 U. S. 956; on remand at 235 F. 2d 327, and rehearing denied at 237 F. 2d 165.[1]

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Respondent cannot accept Petitioner's statement of the Questions Presented (Pet. 2) because they are not expressed in the terms and circumstances of the case but are hypothetical and unsupported by the record.

This was a proceeding *in rem* by the United States for the condemnation of a flowage easement over fast land riparian to a navigable stream, where the issues were the amount of just compensation for the Government's flowage easement over 1840 acres of a 7400 acre tract and the allocation of such compensation to the owners of interests in such land to the extent of the value of their respective interests. Just compensation of $70,920 for the Government's flowage easement was determined on the basis of the difference in value of the servient land before and after the taking of such easement, excluding from the valuation in both instances any element of value arising from the availability of the land for water power purposes.

The Power Company had previously acquired from the fee owner an easement to flood *permanently* 1540 acres of the 7400 acre tract, within the 1840 acres which were later subjected to the Government's flowage easement. As compensa-

[1] All of these opinions are printed in U. S. App. 93-100b. For the convenience of the Court we have included in the Appendix to this brief the district court's order appointing commissioners, the instructions and the report of the commissioners (App. 1-4, 5-6, 7-12).

tion for its aforesaid interest in the land, the district court held that the Power Company was entitled to share in the award to the extent of the value of its interest, amounting to $65,520, a sum equivalent to what would have been the compensation for the Government's flowage easement over the same 1540 acres of the 7400 acre tract. The owner of the underlying fee, having agreed in an option contract with the Government to accept $1.00 for her interest in the land expressly subject to the Power Company's flowage easement, made no further claim to the remaining $5400 of the just compensation for the Government's flowage easement.

Thus, the only questions which can now be fairly presented are:

1. Whether this Court should review the decision below holding that the owner of a valid and existing flowage easement was entitled to compensation therefor.

2. Whether this Court should review the decision below approving the district court's holding that the owner of an easement to flood permanently 1540 acres of the 7400 acre tract was entitled to a share in the award of just compensation for the Government's flowage easement for an amount equivalent to what would have been the compensation for the Government's flowage easement over the same 1540 acres of the 7400 acre tract.

3. Whether the decision below is in conflict with the decisions of this Court or with decisions of other courts of appeal.

STATEMENT OF THE CASE

The Government's statement of the "facts of the case in its current posture" (Pet. 2) does not present an adequate picture of the case. The facts material to the consideration

of the questions presented are stated below.

Under a declaration of taking filed October 23, 1952, and the deposit of estimated compensation of $1.00, the United States acquired a perpetual easement "to overflow, permanently or intermittently, as may be necessary for the construction, maintenance and operation of the John H. Kerr Dam and Reservoir,"[2] 1840 acres of a 7400 acre tract, known as the Falkland Estate, riparian to the Dan River in Halifax County, Virginia. On the same day, the United States also filed a complaint in an *in rem* proceeding "for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest."[3] describing the flowage easement taken by the Government and the land involved. The fee owner was a named party.

Neither the declaration of taking nor the complaint stated that the Power Company had any interest in the property. The complaint recognized that there might be others who might "have or claim some interest in the property taken," and they were made parties to the proceeding under the designation "Unknown Ow[illegible]"[4] The Power Company, however, received a notice [illegible]sing that the complaint had been filed and that at the trial of the issue of just compensation, the Power Company could "present evidence as to the amount of compensation to be paid for the property in which [it had] an interest and [the Power Company] might share in the distribution of the award of compensation."[5]

The Power Company filed notice of appearance, stating that it had an interest in the property and reserving the

[2] U. S. App. 10-18 at 11.
[3] U. S. App. 1-10 at 1-2.
[4] U. S. App. 3.
[5] Vepco App. 3-5, esp. 5.

right to contest the issue of just compensation for the Government's easement thereon and to present evidence of the value of such property and of the Power Company's interest therein.[6]

Subsequently, the parties stipulated that on October 23, 1952, the Power Company had an easement to flood permanently 1540 acres of the 7400 acre tract, within the 1840 acres embraced by the Government's flowage easement.[7] Contrary to the statements in the Government's petition (Pet. 12 and footnote 8 on page 13), the Power Company's flowage easement was acquired from the fee owner in 1925 (U. S. App. 18-20, 217-223) and was not, as the Government alleges, "for all practical purposes abandoned" (Pet. 15; cf. U. S. App. 47-56).

In an option contract dated April 30, 1951, made in consideration of $1.00 and "other valuable considerations," the owner of the underlying fee had agreed to convey to the United States the right to overflow the land to the extent of 1840 acres as might be necessary for the Government's project, *expressly* subject however to the rights of the Power Company to flood 1540 acres of such land.[8] Although the Government had exercised this option, the fee owner made no conveyance, and the Government made the fee owner a party to the declaration of taking and the condemnation proceeding for the purpose of acquiring her interest.[9] The

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[6] Vepco App. 6.

[7] Stipulation of Facts, par. 7, 8, 9, and 11, U. S. App. 84 at 86-88. The Government's statement of Vepco's interest (Pet. 4) is not correct.

[8] Government Exhibit 1; U. S. App. 72-84.

[9] Vepco App. 25-26, Government's Answers to Vepco's Interrogatories 5 and 6, Vepco App. 22. Also, U. S. App. 81 par. (6) of the option contract; Vepco App. 152. The Government's petition would indicate that the settlement with the fee owner was an accomplished fact. That is misleading because as yet no order has been entered for the payment to the fee owner of the agreed consideration of $1.00 for her interest, although the Government's attorney had prepared a sketch thereof, Vepco App. 130.

Government conceded that it had "acquired nothing" under this option contract and at the trial on January 18, 1954, its objection to any evidence regarding the fee owner's reasons for making such an agreement was sustained.[10]

We will not repeat the long history of this case from the first trial until the cause was remanded to the district court,[11] for that is succinctly reviewed in the court of appeals' opinion of October 5, 1959 (270 F. 2d 707, 709-710; Pet. App. 19-21). It should be pointed out, however, that until the Government's Petition for Rehearing was filed on August 30, 1956, the Government had taken the position that in any event the Government would only be liable for the difference in value of the land with and without the servitude of the easement acquired by the Government.[12] The Government's arguments then being that the infrequency of flooding under the Government's intermittent flowage easement made it less burdensome than the Power Company's easement to flood permanently[13] and, further, that there were benefits to the residue of the 7400-acre tract resulting from

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[10] U. S. App. 41-43, esp. 43, and Interrogatory 6 and answers thereto in Vepco App. 22 and 25-26. The statement on pages 3-4 of the petition that the Government had initially intended to condemn the fee but at the "urgent request of the fee owner" had agreed to acquire only a flowage easement, is partial and misleading. On the other hand, the Government accepted the underlying fee owner's offer to convey an easement subject to the outstanding interest of the Power Company "[i]n view of the very substantial savings involved" (Vepco App. 171, see also Vepco App. 151-152, 167-168, 169-183). In its first brief filed with the court of appeals, the Government explained that this practice was "not of recent origin" (p. 22) and it was ". . . the policy of the Government to condemn only the minimum interest which it needs to accomplish its purpose and leave to the landowner as much of his property as possible . . ." (September 1954, No. 6839, pages 25-26).

[11] Vepco App. 58-60.

[12] 218 F. 2d 524, 525; 270 F. 2d 707, 709.

[13] U. S. App. 61-62, 69; this point was argued vigorously in the Government's brief of September 1954 on pages 21, 24-25.

the Government's project, which would reduce the amount of compensation or damages.[14]

On remand from the court of appeals, the district court entered an order appointing commissioners to determine the compensation for the Government's flowage easement over 1840 acres of the 7400 acre tract[15] and gave them instructions.[16] The Government made only a general objection to the inquiries submitted by the Court to the commissioners and to the instructions, upon the ground that they were erroneous because they did not require the commissioners to determine the value of the Power Company's flowage easement.[17]

At the hearings before the commissioners the Government offered no evidence and did not claim there were any benefits to the residue. No objections were filed to the commissioners' report and it was confirmed by the district court. The commissioners stated in their report that the residue had been damaged "beyond any peculiar benefits that might accrue to such property from the acquisition of the easement by the United States and converting it to its uses," which benefits, if any, the district court's order required them to consider.[18] Excluding from their valuations any element of value arising from the availability of

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[14] U. S. App. 69; footnote 6 on pages 8-9 of the Government's Petition for Writ of Certiorari, No. 41, October Term 1955, Vepco App. 54-55; and 33 U. S. C. § 595, which is applicable here by reason of 33 U. S. C. §§ 591, 701c, U. S. App. 4, 10-11.

[15] App. 1-4; U. S. App. 106-110. The two exhibits attached to this order are printed in Vepco App. 61-66.

[16] App. 5-6; U. S. App. 111-112.

[17] U. S. App. 103-105, 113, 118-122, 123; cf. the second paragraph of footnote 3 on page 6 of the Government's petition. That was the same position the Government had taken in its petition for rehearing of August 30, 1956, which was rejected by the court of appeals, 237 F. 2d 165; U. S. App. 100a-100b.

[18] App. 1 at 4; U. S. App. 106 at 109 and App. 7 at 9; U. S. App. 124 at 126.

the land for water power purposes, the commissioners determined that $70,920 was the just compensation for the Government's flowage easement over 1840 acres of the 7400 acre tract.[19]

After hearing evidence, the district court overruled the Government's motion to exclude from "any award of just compensation to the defendants herein any element of compensation based on damages to the residue of the land involved," based upon the contention that the Government's option cont[illegible] with the fee owner had included a settlement for all the damages to the residue.[20] The district court held that when the Power Company acquired its flowage easement over 1540 acres of the 7400 acre tract, it paid for the resulting damages to the residue of that tract and, since the Government's easement over the same land caused damages to the residue, that the Power Company's share in the just compensation for the Government's easement should reflect such damages (App. 13-20 at 18; U. S. App. 179-188 at 186).

The district court then determined that the compensation to the Power Company for its easement to flood permanently 1540 acres of the 7400 acre tract, within the 1840 acres embraced by the Government's easement, should be $65,520 and entered judgment accordingly. That sum was equivalent to the compensation determined by the commissioners for the Government's easement upon the assumption that such easement involved only the 1540 acres covered by the Power Company's easement. This had been done under the second inquiry to the commissioners—which inquiry the

[19] App. 7 at 10; U. S. App. 124 at 127.

[20] U. S. App. 174-178. The evidence included the 1925 deed granting the flowage easement to the Power Company's predecessor, wherein the fee owner released all claims for damages to the residue of the Falkland Estate resulting from such flooding, see Government Exhibit C, U. S. App. 217-222, esp. 221.

district court held was "the appropriate measure of compensation."[21]

The Court of Appeals affirmed.

ARGUMENT

I.

No Question Presentable on This Record Merits Review

The Government's petition (page 3) correctly states that this was a proceeding to condemn a flowage easement "over the tract now involved", required for its use in the operation of the Kerr Dam Reservoir, in which:

> "The issue was how much compensation was owed for the imposition of that easement and to whom it should be paid."[22]

The petition then, at page 6, demonstrates that the procedure for determining the compensation owed for the imposition of the Government's easement was correctly followed:

> ". . . The *'res'* valued was the before-and-after value of the Falkland Estate * * * of some 7,400 acres rather than the respondent's claimed flowage easement involving only 1,540 acres. . . ."[23]

Thus, it appears on the face of the Government's petition

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[21] App. 19; U. S. App. 186.

[22] See also U. S. App. 174, 176-177.

[23] This was clearly proper for in the United States Army Corps of Engineers, *Real Property Appraisers' Handbook* (U. S. Government Printing Office, October, 1955), it is said (at page 34): "In valuing flowage easements, appraisals of the fair market values of two distinct estates are required; the entire land tract before imposition of the easement and the entire land tract after imposition of the easement. *The difference between the appraisals of the two estates represents the damages, or the value of the easement.*" This is the law of the land. *Olson* v. *United States*, 292 U. S. 246, 253, 255-257 (1934); *Karlson* v. *United States*, 82 F 2d 330, 337 (8th Cir. 1936).

that procedurally, at least, the case was decided in an unassailable fashion. No doubt it is for this reason that the Government's statement of the "Questions Presented" relate only to the allocation by the district court of what is admittedly the just compensation owed by the United States for the imposition of its easement.

By the same token, the varying arguments interspersed throughout the Government's petition concerning the valuation of the Power Company's interest relate only to the allocation between the condemnees of the just compensation owed. As the Government has maintained from the outset, all the rights it now has in the Falkland Estate *were obtained in this proceeding.*[24] The valuation of the Power Company's rights would have nothing to do with the just compensation owed for the rights acquired by the Government in this proceeding because the Government took *both more and less* than the Power Company's interest. Consequently, the valuation of the Power Company's interest was solely a matter of allocation of the award between condemnees and would not measure the just compensation for the Government's easement.[25]

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[24] See *supra*, pages 5-6; and footnotes 9 and 10 on those pages.

[25] The Government's argument that *only* the Power Company's easement should have been valued cannot be supported under its own pleadings and the uncontradicted facts. Nor has the Government advanced any reason for reviewing the holdings of the court below (1) that this was an *in rem* proceeding requiring just compensation to be fixed without regard to ownership of the property (235 F. 2d 327, 329; and 237 F. 2d 165, 166; in addition to the authorities cited by the court of appeals, see *United States* v. *25,936 Acres, etc.*, 153 F. 2d 277, 279 (3d Cir. 1946); *Eagle Lake Improvement Co.* v. *United States*, 160 F. 2d 182, 184 (5th Cir. 1947), *cert. den. sub nom. Humble Oil & Ref. Co.* v. *United States*, 332 U. S. 762 (1947); *Burkhart* v. *United States*, 227 F. 2d 659, 662, 663 (9th Cir. 1955); Annot., 166 A. L. R. 1211 (1947); 4 Nichols, *Eminent Domain* (3d ed. 1951) §12.3[1] p. 144; 2 Lewis, *Eminent Domain* (3d ed. 1909) §716, p. 1253, and (2) that this case did not involve the imposition of an additional or second easement, requiring a determination of the decrease in value of the use of the prior easement (237 F. 2d 165, 166).

Thus, the only possible question now in this case relates to the allocation of a part of the just compensation to the holder of an interest in the property upon which the Government has imposed its flowage easement. Under the well-settled doctrine that the condemnor is not concerned with the distribution of the award among the owners of interests and rights in the land[26] it is clear that the Government has not raised any substantial question warranting review by this Court.

Respondent, however, will show in this brief that none of the contentions in the Government's petition has merit.

II.

The Court Below Correctly Held That the Owner of a Valid and Existing Flowage Easement Over Riparian Land Was Entitled to Compensation Therefor.

The Government's petition does not directly address the question whether the owner of the right to flood riparian land is entitled to any compensation when the United States takes over or destroys that right. The petition, however, does this indirectly by various contentions to the effect that proper standards or principles were not followed in measuring the compensation for that flowage easement. By these arguments the Government attempts to force the conclusion that a private property right of this nature is not

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[26] *United States* v. *Dunnington*, 146 U. S. 338, 352-353 (1892); *City of St. Paul* v. *Certain Lands, etc.*, 48 F. 2d 805, 807 (8th Cir. 1931); *United States* v. *Certain Lands in the Borough of Brooklyn*, 129 F. 2d 577 (2d Cir. 1942); *United States* v. *19,573.59 Acres of Land in Cheyenne County, Nebraska*, 70 F. Supp. 610 (D. Neb. 1947), *aff'd sub nom. State of Nebraska* v. *United States*, 164 F. 2d 866 (8th Cir. 1947), *cert. den.* 334 U. S. 815 (1948); *United States* v. *Adamant Co.*, 197 F. 2d 1, 5 (9th Cir. 1952); 2 Nichols, *Eminent Domain* (3d ed. 1950), § 5.3[4], p. 51; and 4 Nichols, *op. cit.*, § 12.42[2], p. 172; Rule 71A(c)(2), Fed. R. Civ. P.; 3 Barron and Holtzoff, Federal Practice and Procedure, Rules Edition, § 1519, p. 554.

compensable in a taking by the United States. The Government's arguments, however, are based upon the hypothesis or "truism" (Pet. 7) that a private owner's right to flood riparian land has no value since the owner does not also have the right to *use* the waters of a navigable stream for power purposes. In other words, according to the Government, it is the owner's use or ability to use his property which gives the property value.

This is indeed a new and novel doctrine (for which the Government cites no authority) that has been rejected five times in so many words by the court below, in opinions representing the considered judgment of six judges. This was done at least three times in the instant case[27] and twice more in that court's consideration of the Government's same contention in *United States* v. *Twin City Power Company*, 248 F. 2d 108, 113; *rehearing den.* 248 F. 2d 114, 115 (1957), *cert. den.*, 356 U. S. 918 (1958). In the opinion which this Court declined to review, the Court of Appeals held that the Government's contention violated elementary principles of valuation (248 F. 2d 114 at 115).

The right to overflow land is not a water privilege. The Government has a paramount navigation servitude over the subaqueous land of a navigable stream and the paramount right to the use of the flow of the water of such stream, but it does not follow in logic or in common sense that this paramount servitude in the flow of the stream includes the right to overflow fast land riparian to a navigable stream. This being true, it follows that when that is done, the Government must pay just compensation therefor to the owners of interests or estates in such land. When such compensation is fairly determined, the distribution of the award is, to put it bluntly, none of the Government's busi-

[27] 235 F. 2d 327, 329; 237 F. 2d 165, 166; and 270 F. 2d 707, 710-711.

ness. The only valid exception is where the Government has made settlement with the owner of an interest in the land, in which event the Government should receive credit for the portion of the award which would otherwise be paid to that owner. This was done in the instant case and the Government has been guilty of overreaching in its varying attempts at different stages of this litigation, over a period of more than seven years, to obtain more consideration than it lawfully deserved and to defeat payment of a portion of the just compensation to the Power Company to the extent of the value of its property interest in the 7400 acre Falkland Estate.

III.

There Is No Reason for This Court's Review of the Decision Approving the District Court's Holding That the Owner of a Flowage Easement Was Entitled to Share in the Just Compensation for the Government's Flowage Easement to the Extent of the Value of the Owner's Interest in the Land Involved.

It has heretofore been shown that the Government cannot now argue that the just compensation for the Government's flowage easement amounting to $70,920 was not correctly determined and that the only remaining question concerns the allocation of the award of just compensation among the respective owners of interests or estates in the land involved. Only two of the parties had claims, the owner of the underlying fee and the Power Company to which the fee owner had, for a valuable consideration, conveyed the right to flood permanently most of the same land. The owner of the underlying fee having agreed with the Government for valuable considerations, to accept $1.00 for her share in the award, the amount of the compensation properly attributable to the

interest of the owner of the underlying fee ($5400) was reduced to $1.00 and the Government has been required to pay the Power Company only the share of the compensation that is attributable to the value of its flowage easement over the same land. The allocation or apportionment of the award between the several owners of property interests in the land depends upon the nature, extent and value of their interests. The procedure for allocating the compensation award between the owner of the underlying fee and the owner of the flowage easement, which was followed in the instant case, was clearly spelled out in *United States* v. *Twin City Power Co.*, 248 F. 2d 108 at 114 and in the opinion denying rehearing, 248 F. 2d 114 at 115, *cert. den.*, 356 U. S. 918 (1958).

In this case, the owner of the underlying fee recognized, that the Power Company's flowage easement had value (1) in the option contract with the Government, and (2) by making no claim to any portion of the award of just compensation other than the amount agreed upon in the option contract. In making the agreement with the owner of the underlying fee, the Government also recognized that the Power Company's rights had value (see Vepco App. 167, at 169-172 and 177-179).[28]

The Government's petition contends that the Power Company's easement diminished the fee value "only to the extent that there was a reasonable probability of its exercise" (Pet. 12) and that it had only a nominal or nuisance value as a cloud on the title (Pet. 11, fn. 5) but the Government has *never* offered evidence supporting these contentions. The

[28] Defendant's Exhibit 1, Vepco App. 182 at 183 (introduced at Vepco App. 145) reads in part as follows: "Colonel Frech also reports that representatives of the Estate are agreeable to conveying, in lieu of fee title, a comprehensive flowage easement to the Government for a nominal consideration, *subject to rights now held by the Virginia Electric Power Company. The rights of the Virginia Electric Power Company will be the subject of separate negotiations.*"

Government also errs in claiming that there was no evidence whatever indicating that the Power Company's flowage easement had value as such on the date of the taking (Pet. 11, fn. 5) for that was established at the outset by the uncontradicted testimony of the Respondent's witness Blackburn, to the complete satisfaction of the district court (U. S. App. 47-57, esp. 56-57).[29]

When the matter of how the just compensation "should be distributed between the fee owner and the Power Company came before the district court for decision,[30] the Government's position was that the Power Company was not entitled to anything and, in any event, not to any of the damage to the residue because it had "no interest in or ownership of any part of the 'residue' ".[31]

After hearing evidence and argument the district court overruled the Government's motion.[32] It should be noted that the Government did not even mention that no compensation should be paid to the Power Company because it had no right to use the land for agricultural, grazing or forestry purposes (U. S. App. 188-189; Vepco App. 179-183).

A.

THE POWER COMPANY WAS NOT PAID FOR THE RIGHT TO USE THE LAND FOR AGRICULTURAL OR FORESTRY PURPOSES.

The Government's assertion that the Power Company received the value of the land for agricultural, grazing or forestry purposes on the theory that it had the right to so

[29] The Government admitted this on pages 9-11 and 29-30 of its first brief filed with the Court of Appeals (September 1954, No. 6839).

[30] See Government's Offer of Proof, U. S. App. 176.

[31] U. S. App. 174-175.

[32] App. 13 at 19; U. S. App. 179 at 186.

use the land (Pet. 2 and 7-8) is unfounded. The Government did not advance this argument in the district court.

Defendant's witnesses, who were uncontradicted and testified without objection, stated that the highest and best use of the land was for agricultural, grazing or forestry purposes and they estimated *fee* values accordingly. These witnesses did not give the same fee values and they differed with respect to the amount and extent of the *depreciation* of the fee values because of the imposition of the Government's intermittent flowage easement. The commissioners disagreed, for their determinations were substantially less than the estimates by the valuation witnesses (270 F. 2d 707, 711). There is, therefore, no basis for the Government's claim that the commissioners' determinations, to which the Government did not object and which were confirmed by the district court, represented the entire value of the property for agricultural, grazing or forestry purposes. The commissioners determined only the *difference* in the value of the land before ($596,000) and after ($525,080) the imposition of the Government's easement.[33] Clearly there was a substantial "residual value" left in some of the land subject to the Government's easement. Finally, the district court, upon the evidence before it, determined that only a *portion* of the compensation for the Government's easement should be paid to the Power Company for its right to flood permanently a part of the land taken by the Government.

This same argument has been rejected sharply, the Court of Appeals saying ". . . the fact is that we made no such

[33] App. 10; U. S. App. 127. The same applies to the commissioners' findings with respect to the second inquiry where they found a "before" value of $596,000 and an "after" value of $530,580 (App. 11; U. S. App. 128). The awards in the first and second trials of this case are in no wise comparable, see cross-examination of the Power Company's appraisers, U. S. App. 35-40.

holding then and we make none now." (270 F. 2d 707 at 712).

It is submitted that the clear statement by the court below should foreclose any further argument.

B.

THE POWER COMPANY WAS NOT COMPENSATED IN EXCESS OF THE VALUE OF ITS FLOWAGE EASEMENT UPON THE FALKLAND ESTATE.

The Government's claim that the Power Company was paid "severance damages" to which it was not entitled (Pet. 3 and 13-15) cannot be sustained. There is no reference to "severance damages" in the inquiries submitted to the commissioners, their instructions, the evidence, the commissioners' report or in the district court's judgment order. On the other hand, the commissioners' report stated, pursuant to the Government's request,[34] that the $65,500 difference in the value of the land with and without the servitude of the Government's intermittent flowage easement, assuming that its easement was limited to the 1540 acres subject to the Power Company's easement to flood permanently, included "damages to the residue" amounting to $11,720.

This Court has pointed out that the term "severance damages" does not convey its dictionary meaning and is a loose term used in a subsidiary rule for ascertaining just compensation.[35] The process of determining values before and after the imposition of an easement includes all considerations, such as damages to the residue and benefits.[36] There is no authority holding, as the Government contends (Pet.

[34] App. 7 at 10-11; U. S. App. 128.

[35] *United States* v. *Miller*, 317 U. S. 369, 375-376 (1943).

[36] 4 Nichols, Eminent Domain (3d ed. 1951) §§ 14.232 and 14.232[1] at 332-337.

13-15), that damages to the residue can be awarded *only* where the taking is in fee.[37]

The question whether there was a lack of unity of ownership or use with respect to the portion taken and the portion remaining was a matter for decision in the district court, *United States* v. *Mills*, 237 F. 2d 401, 404-405 (8th Cir. 1956); Annot., 6 A. L. R. 2d 1197 at 1207 (1949). None of the cases cited in the Government's petition, page 14, involves situations similar to the instant case and are not applicable.

Evidence of the damages to the residue "proved the existence and the amount and was uncontradicted" (270 F. 2d 707, 713). The district court held that the value of the Power Company's interest should be measured by its extent, which included damages to the residue, and that the Power Company should share accordingly in the compensation for the Government's easement. The court below approved that *measure* of value (270 F. 2d 707, 713-714).

Thus, there is no substantial basis for the Government's contentions that this case should be reviewed by this Court because the court below "fail[ed] to appreciate the scope of the principle under which different titles vested in different

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[37] See *United States* v. *Dickinson*, 152 F. 2d 865, 869-870 (4th Cir. 1946), *aff'd* 331 U. S. 745, 750-751 (1947), a proceeding under the Tucker Act for compensation for the "taking" of a flowage easement; see *United States* v. *Grizzard*, 219 U. S. 180 (1911); *Karlson* v. *United States*, 82 F. 2d 330, 337 (8th Cir. 1936); and *Slattery* v. *United States*, 231 F. 2d 37 (5th Cir. 1956).

The case of *United States* v. *Honolulu Plantation Co.*, 182 F. 2d 172 (9th Cir. 1950), *cert. den.* 340 U. S. 820 (1951) does not hold, as the Government suggests (Pet. 13-14), that severance damages can be recovered *only* where there is condemnation of the "fee simple title of a tract." That statement is dictum, unsupported by authority, and is contrary to all decisions by this and other courts involving the condemnation or taking of flowage easements. The Government's contention is also contrary to official instructions to Government appraisers, see *supra*, page 9, footnote 23.

persons have repeatedly been held inadequate support for an award of severance damages" (Pet. 14), or for the reason that "any 'severance damage' to *flowage easements* (sic) over land not embraced in the Government's condemnation would have to be based on some theory of *interference* with or *frustration* of a right to development of water power. . . ." (Pet. 15).

C.

THE GOVERNMENT'S ANALOGY TO PROCEEDINGS UNDER THE TUCKER ACT DOES NOT SUSTAIN ITS POSITION

The Government's arguments based upon an analogy to cases under the Tucker Act (Pet. 9, 10-11) are improper because they are erroneously based upon the premise that the instant condemnation suit involved *only* the value of the Power Company's flowage easement and that a procedure different from that followed in eminent-domain proceedings would be applied, i.e. frustration of use. But this case cannot be so regarded because it is an *in rem* proceeding against the land, wherein the owner of the underlying fee and other "unknown owners" of interests or estates in the property are parties and the issues were the amount of just compensation for the rights taken by the *Government* (not the Power Company's) *and* the allocation of such compensation to the holders of interests in the property taken or damaged. There was no conveyance to the Government by the owner of the underlying fee and the rights of the underlying fee owner were involved in this proceeding. Had this matter been left to resolution under the Tucker Act, the determination of the just compensation for the property damaged by the Government's unauthorized flooding, and the allocation of such compensation to the owners of interests therein would follow the same procedure as was followed in the instant case. In

both instances the valuations are made on the basis of the before and after values of the land involved, as of the time of the "taking," or of the Government's entry upon the land, including all past, present and prospective damages—both to the land "taken" and to the residue.[38]

Therefore, it is clear that the Power Company would be entitled to receive the same compensation in a proceeding under the Tucker Act as was determined in the instant condemnation case and that the Government's "frustration of use" doctrine, which it now advances for the first time in this protracted litigation, would not be applicable.

D.

THE GOVERNMENT'S "SETTLEMENT" WITH THE OWNER OF THE UNDERLYING FEE HAS NOT PREJUDICED ITS POSITION.

The Government has assumed inconsistent positions with respect to its "settlement" with the fee owner. The Government contends that the court below has given "great importance to a completely irrelevant factor, *i.e.* the rights of the fee owner" (Pet. 8) and later asserts that "the fact that the Government has *settled* with one of several condemnees is not to be ignored, nor does it enlarge the rights of others or entitle them to compensation for more than the legal interest they themselves have in the property" (Pet. 10).

[38] *United States* v. *Dickinson*, 152 F. 2d 865 (4th Cir. 1946), *aff'd* 331 U. S. 745 (1947) and the authorities discussed in both opinions. See also, *United States* v. *Dow*, 357 U. S. 17 (1958), which is referred to on pages 9 and 16 of the Government's petition; *Hurley* v. *Kincaid*, 285 U. S. 95, 104 (1932), cited on page 9 of the Government's petition. The Government's liability is neither more nor less in either case. In *Jacobs* v. *United States*, 290 U. S. 13 (1933), where there was an award under the Tucker Act, this Court said (at p. 16): ". . . The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim."

Subsequently, the Government says that it is "legally immaterial" that "the United States, under the rule we advocate, would be getting something for nothing" (Pet. 12). Finally, the Government contends that, relying upon the authority of the decisions of the Court of Appeals in the instant case, "the public has been required to pay twice for the same property values" (Pet. 15).

The Government is responsible for injecting this matter into the case. The record shows that the Government's "settlement" with the owner of the underlying fee has not enlarged the rights of anyone or resulted in a payment of compensation to anyone of more than the fair market value of their interest in the property. In this case the Government has *not* been *"required* to pay twice for the same property", only once.[39]

Considerations of justice and constitutional right do not permit any court to overlook as immaterial the fact that the Government would be getting something for nothing (270 F. 2d 707, 709) under the unprecedented theories it has advanced at various stages of this litigation. As Chief Judge Parker said (235 F. 2d 327, 330):

> "... *there is no reason in law, in equity, in good conscience or in common honesty* why the compensation to which [the underlying fee owner] would otherwise

[39] As a matter of fact, the Government has been required to pay substantially less than what is the just compensation for its flowage easement. As far as counsel for Respondent can ascertain, the Government has *not* been *required* to pay compensation twice for the same property values in *Augusta Power Co.* v. *United States* (and reverse title No. 150) now awaiting decision in the Fifth Circuit. Nor can this claim be sustained with respect to the compensation which the Government paid voluntarily to the owners of the underlying fee in *United States* v. *Twin City Power Company*, 248 F. 2d 108, 114-115 (4th Cir. 1957), *cert. den.* 356 U. S. 918 (1958). The "flowage acres" involved in both of these cases aggregate 554.77 acres.

> have been entitled should not be paid to the one to whom such rights have been conveyed. . . ."

And as Judge Soper said later (270 F. 2d 707, 712):

> ". . . The Government was justified in giving nothing to Mrs. Williams for the right to flood this additional area because of her agreement; but we find *no justification* for the contention that the Government should not pay the Power Company for the interest which it had acquired in the Falkland tract."

It is submitted, therefore, that the foregoing contentions by the Government afford no substantial basis for review by this Court.

IV.

There Is No Conflict of Decision

This Court did not hold, as the Government's petition implies (Pet. 7, 8, 9 and 15), that no compensation could be awarded for flowage easements in *United States* v. *Twin City Power Company*, 350 U. S. 222 (1956), or in vacating the first judgment in this case and remanding it for further consideration in the light of its decision in the *Twin City* case.

On the other hand, this Court's holding in the *Twin City* case was that in the valuation of fast land adjacent to a navigable stream the valuation of such land for its highest and best use could not include the land's adaptability for water power purposes.

The Government now wishes to expand that doctrine to include other elements of value not related to the flow of the stream. This is shown by the Government's failure to discuss the clear distinction between the *Twin City* decision and this

case which was drawn by Chief Judge Parker in the Court of Appeals' second opinion in the instant case (235 F. 2d 327, 329).

Subsequent actions by the court below and by this Court, in the continuation of the litigation in the *Twin City* case, have made this distinction crystal clear. For upon the remand of the *Twin City* case, *supra*, the district court held that compensation for the taking of certain flowage easements over approximately 156 acres should be denied if power site value were not included. But the Court of Appeals reversed that ruling by the district court and remanded the cause for further proceedings to place a value on the flowage easements (248 F. 2d 108, 4th Cir. 1957), the Government's petition for a rehearing on this point was denied (248 F. 2d 113, 114, 4th Cir. 1957). Whereupon, the Government applied to this Court for certiorari and one of the "Questions Presented" on page 2 of its petition (No. 785, October Term, 1957) was:

> "3. Whether the United States may be required to pay agricultural or timber value for the destruction of a flowage easement."

All of the Government's contentions and claims in that petition with respect to the question of the value to be accorded flowage easements (*ibid.*, pp. 14-18 and on pages 7-10 of the Reply Memorandum of March 1958) are repeated almost verbatim in its present petition.

The Government now seeks to minimize this Court's denial of certiorari in the *Twin City* case, *supra*, (356 U. S. 918). While we know such denial indicates nothing with respect to the merits of that case, it is respectfully submitted that if the third question in the Government's petition in the *Twin City* case (which is substantially the same as the Government's second question presented in the instant case)

had been so clear, so important, or the decision of the Court of Appeals so erroneous, or the matter so fundamental to the further conduct of that case, as the Government then contended, the fact that "the judgment as to the flowage easement question was not final" is not so important a distinction as the Government now makes (Pet. 16). Furthermore, what the Government has overlooked completely is that there would have been no point in this Court's remand of the instant case for further consideration in the light of *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), if flowage easements were not compensable under that decision.

It would seem, therefore, that Judge Soper, the only circuit judge who has participated in all of these flowage easement cases in the Fourth Circuit, was right when he said (270 F. 2d 707, 710-711):

> "It seems plain to us that the flowage easement of the Power Company had substantial market value in its hands in spite of the fact that the availability of land as a potential power site is not an element of value to be considered in the condemnation by the United States of a riparian owner's rights. Although it is true that the Power Company could not use the waters of the stream for power purposes except with the approval of the United States, it is equally true that neither the United States nor anyone else could use the land in connection with the stream as a power site so long as the Power Company possessed the flowage easement acquired from the owner of the fee . . . Obviously, anyone who desired to acquire the rights would expect to pay for them, and their value, whether in the hands of the owner of the fee or of her grantee, would be what they would bring in the open market."

Instead of being new or novel, this question is by now a very tired issue.

The Government has not cited any decision by this Court or by any court of appeals which conflicts with the holdings by the Court of Appeals in the last three decisions in this case.

CONCLUSION

For the foregoing reasons it is submitted that none of the four grounds urged for granting the writ are valid and the petition should be denied.

Respectfully submitted,

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April 1, 1960

APPENDIX

ORDER APPOINTING COMMISSIONERS
(U. S. App. 106-110)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, CONTINUED AND HELD AT ROANOKE ON THE 1ST DAY OF MAY, 1958

Civil No. 296

UNITED STATES OF AMERICA, PLAINTIFF,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

ORDER APPOINTING COMMISSIONERS

ON MOTION OF THE DEFENDANT, Virginia Electric and Power Company, for the appointment of commissioners to determine the just compensation to be paid to said defendant for the acquisition by condemnation by the United States of America of an easement over the tract of land designated and described in this proceeding as Tract No. EF-3100E, a description of which tract is hereto attached marked Exhibit A,

IT APPEARING TO THE COURT that notice of condemnation has been duly served, as required by Rule 71A of the Rules of Civil Procedure, upon all persons having or claiming any interest in said tract, and that the plaintiff has demanded a jury trial on the issue of just compensation, and

IT FURTHER APPEARING TO THE COURT

(1) That the lands in question are located approximately sixty miles from Danville, Virginia, the nearest city in which Federal Court sits;

(2) That upon the trial of this case the defendant intends to offer the oral testimony of residents of the area in which these lands lie, and that it would be inconvenient, expensive and burdensome for such witnesses to travel to Danville to give their testimony in this case;

(3) That it will not be feasible for the issues in this case to be determined by a jury because of the distance involved, with the difficulty and expense of transporting the jury from Danville to the lands in question, and return;

(4) That because of the character, location and quantity of the property and the unusual nature of the inquiries to be made herein, this proceeding can be materially facilitated by reference to a commission;

(5) That the hearings can be considerably shortened by reference to a commission rather than a jury;

(6) That the issues of compensation can be better determined by a commission than by a jury in the circumstances presented by this case; and

IT APPEARING and the Court now finding that due to the character and location of the property taken, and for the other reasons above recited, it is in the interest of justice that the issue of just compensation in this matter be tried by commissioners pursuant to said Rule 71A,

NOW, THEREFORE, plaintiff's motion for trial by jury is hereby denied, to which ruling of the Court plaintiff excepts, and the Court hereby appoints Robert S. Weaver, Victoria, Virginia, J. T. Thompson, Keysville, Virginia, and James B. Wilborn, South Boston, Virginia, three disinterested freeholders, as commissioners, and with the consent of all counsel, the United States consenting without waiving its demand for trial by jury and its exception to the Court's denial of said demand, the Court hereby appoints Wirt Shapard, Halifax, Virginia, as alternate commissioner to

serve in the event of inability of one of the regular commissioners to act.

Pursuant to said Rule 71A, the commission shall have the powers of a master provided in Rule 53 of the Federal Rules of Civil Procedure, including the power to regulate the proceedings, rule on questions of evidence and to do all acts and take all measures necessary or proper for the efficient performance of its duties under this order.

The duty of the Commissioners shall be to ascertain and report on each of the following inquiries:

> FIRST: What is the difference between the fair market value of the Falkland Tract, consisting of 7,400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?
>
> SECOND: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?
>
> * * * *
>
> [NOTE: The omitted Third and Fourth Inquiries may be found in U. S. App. 108-109.]

In making the First, Second and Fourth inquiries, the commissioners shall include only such damage, if any, to the residue which are over and above the benefits, if any, peculiar to the residue in each instance, resulting directly from the taking and proposed use to be made by the Government of the land taken herein.

IT IS FURTHER ORDERED that said commissioners meet at 10:00 o'clock A.M. on the 2nd day of June, 1958, at the Halifax County Court House, in Halifax, Virginia, to be sworn and instructed as to their duties as such. The commissioners shall be sworn by the Clerk, or Deputy Clerk of the Circuit Court of Halifax County, Virginia, or by a Notary Public. Thereafter, the Commissioners will, as soon as may be, proceed to view the above described tract of land and proceed to execute their duties as to the ascertainment of the just compensation for the condemnation thereof. The Court hereby sets the fees of said commissioners at the sum of $25.00 per day and expenses.

IT IS FURTHER ORDERED that the Clerk of this Court forthwith transmit to the United States Marshal for the Western District of Virginia five certified copies of this order and that said Marshal will, as soon as may be, with due diligence, serve a copy of this order on each of the above-named commissioners and the alternate commissioner, and that the Marshal will thereafter make the return to the Clerk's Office of this Court, at Roanoke, showing how and when he has executed this order.

/s/ JOHN PAUL,
District Judge.

A true copy, Teste:

CLARENCE E. GENTRY,
Clerk.

By GRACE A. HARPER,
Deputy Clerk.

INSTRUCTIONS TO COMMISSIONERS

(U. S. App. 111-112)

Civil No. 296

UNITED STATES OF AMERICA, PLAINTIFF

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

INSTRUCTIONS TO COMMISSIONERS

The Court instructs the Commissioners that in performing your duties you should go upon the land, examine it, hear testimony and consider such testimony along with your personal observation in arriving at your conclusions.

Fair market value is the price which an informed and intelligent purchaser, who desires to buy but is not compelled to buy, would be willing to pay, and the price which an informed and intelligent owner, who desires to sell but is not compelled to sell, would be willing to accept for the property.

In determining the fair market value the property should be evaluated on the basis of the highest and best use (i.e. the most profitable and advantageous use) to which it is reasonably adapted at the time of taking or might be adapted in the reasonably foreseeable future, even though the property was not being so used at the time it was taken.

While you must abstain from any speculative or conjectural ascertainments both in the use of the property and in its fair market value, it is proper that the use of the property be measured in respect not only to the time of the taking but to the reasonably foreseeable future.

You must exclude, however, from all your valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream.

Inasmuch as the landowner, with the consent of the Government, has sold all of the growing timber on Tract FF3100E, and the same has already been cut, you should not include the value of such timber in making your determination of the inquiries set forth in the order appointing you commissioners.

In making your determination of fair market value, you should disregard the fact that Virginia Electric and Power Company has a perpetual flowage easement over some of the land involved in this case and that the owner of the fee, Olive Vaughan Williams, and the United States made an option contract dated April 30, 1951, and you are further instructed that you should not attempt to determine the value of the respective interests of the owner of the fee or of such flowage easement.

JOHN PAUL,
District Judge.

REPORT OF COMMISSIONERS
(U. S. App. 124-130)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ROANOKE

UNITED STATES OF AMERICA, PLAINTIFF,

2,979.72 ACRES OF LAND, MORE OR LESS, IN THE COUNTY OF HALIFAX, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL., AND UNKNOWN OWNERS, DEFENDANTS

Civil No. 296

Tract No. FF-3100E

REPORT OF COMMISSIONERS

To: The Honorable John Paul, United States District Judge For The Western District of Virginia:

The undersigned, constituting the commission appointed by the Court in the above entitled proceeding, pursuant to Rule 71A and Rule 53 of the Federal Rules of Civil Procedure by order dated May 1, 1958, to which order reference is hereby made, respectfully submit the following report:

1. Pursuant to the aforesaid order, we met at 10:00 a.m. on the 2nd day of June, 1958, at the Halifax County Court House in Halifax, Virginia, and were sworn by the Deputy Clerk of the Circuit Court of Halifax County, Virginia, a copy of which oath is attached to this report marked Exhibit A. After reviewing together the aforesaid order and the Court's instructions to the commissioners dated May 1, 1958, which had been handed to each commissioner

along with the aforesaid order by the United States Marshal serving said order, we met together on the tract of land identified herein as Tract FF-3100E, consisting of approximately 1840 acres of land, and viewed the same, as well as the adjacent or remaining property of the Falkland Tract, consisting of an additional 5560 acres (approximately), and adjourned the proceedings until 10:00 a.m. on the 3rd day of June, 1958, at Halifax County Court House, Halifax, Virginia, for the purpose of hearing evidence as to values to be adduced by any of the parties interested in the proceeding.

2. On the 3rd day of June, 1958, at 10:00 a.m. we met together at the Halifax County Court House, Halifax, Virginia, for the purpose of hearing evidence. At that time and place, evidence was offered only on behalf of the defendants, their witnesses being T. W. Clark and R. M. Felton, Sr., two appraisers, who were qualified before the Commission, who based their findings on their knowledge of land values in the general area; and E. L. Munger, a trained and experienced forester and landowner, who had managed the operations on the Falkland Tract during the past 8 years. The Government did not offer any witness as to value, or as to any other matter, and stated that the Government did not wish to do so as its theory of the case was that, excluding power value, the government's easement was worth only a nominal sum. This hearing was transcribed by a qualified court reporter who has been directed by the commission to file with the Court the original transcript of all the testimony and other incidents at the hearing, together with all exhibits filed or offered at that time, and such transcript and exhibits are requested to be considered by the Court as a part of this report. Arguments were made before the commission in the afternoon of June 3, 1958, and the matter

then submitted to the commission by counsel for the Government and the defendant, whereupon the commission adjourned until 11 o'clock a.m. on June 9, 1958, for further consideration of the matter and for the formulation of its report.

In view of the foregoing, your commission considers it unnecessary to summarize the testimony of any of the witnesses, to comment upon the evidence or to state the basis upon which the witnesses arrived at their opinions of the fair market value or damages except to say that none of the witnesses included in their valuations any element of value arising from the availability of the land for water power purposes. In making its valuations the commission has excluded any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream and has considered the testimony along with their personal observations.

The government did not claim that there were any benefits resulting to the adjacent or remaining property, under the First, Second and Fourth Inquiries, because of the taking and proposed use to be made by the government of the easement taken herein. The evidence showed and, based upon such evidence along with our personal observation, the commission concludes that the adjacent or remaining property, under the First, Second and Fourth Inquiries, has been damaged beyond any peculiar benefits that might accrue to such property from the acquisition of the easement by the United States and converting it to its uses as set out in Exhibit B attached to the aforesaid order appointing commissioners dated May 1, 1958.

3. In arriving at its conclusions as to value and damages, the commission has followed the Court's directions in the order appointing commissioners and the Court's instruc-

tions to commissioners (the reference in such instructions to timber on Tract FF-3100E which had been cut was amended slightly by stipulation of counsel to conform to certain facts about which there was no controversy).

4. Accordingly, the commission ascertains and reports the following answers to the four inquiries by the Court:

I

"FIRST: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840* acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $70,920.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the First Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $525,080.00; accordingly the sum of $70,920 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States.

* Misquoted, U. S. App. 127.

At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated it would not object), we report that in our judgment such damages amount to $11,120.00.

II

"SECOND: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?"

Answer: $65,520.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Second Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $530,580.00, accordingly the sum of $65,520.00 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the government that we

should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $11,720.00.

* * *

[NOTE: The commission's answers and findings with respect to the Third and Fourth Inquiries may be found in U. S. App. 129-130.]

Alternate commissioner Wirt Shapard participated in all proceedings of the commission except in the making of these findings and report.

Given under our hands this 9th day of June, 1958.

Respectfully submitted,

ROBERT S. WEAVER,
Chairman.

J. T. THOMPSON,
JAMES B. WILBORN.

JUDGMENT AND ORDER FOR FINAL DISTRIBUTION BY THE DISTRICT COURT

(U. S. App. 179-188)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA AT LYNCHBURG

Civil No. 296

UNITED STATES OF AMERICA, PLAINTIFF,

v.

2979.72 ACRES OF LAND, MORE OR LESS, IN HALIFAX COUNTY, VIRGINIA, OLIVE VAUGHAN WILLIAMS, ET AL, AND UNKNOWN OWNERS, DEFENDANTS

JUDGMENT AND ORDER FOR FINAL DISTRIBUTION

This matter comes before the Court on motions of the Defendant, Virginia Electric and Power Company, to confirm and adopt the report of the Commissions herein and to award compensation to the said Defendant and upon the motion of the United States of America, by Leigh B. Hanes, Jr., Assistant United States Attorney, to Exclude Damages to Residue.

It appearing to the Court:

(1). That the Declaration of Taking was filed herein on October 23, 1952.

(2). That from the said Declaration of Taking, the papers filed in this proceeding on behalf of the aforesaid parties, including the stipulation dated January 18, 1954, and the evidence heard in open court on the 18th day of January, 1954, that Virginia Electric and Power Company on October 23, 1952, held a perpetual easement to flood

permanently 1,540 acres of the land described herein as Tract No. FF-3100E, parcels A to F.

(3). That by consent of the parties the Court on January 18, 1954, heard evidence and tried the issue of just compensation, and did thereafter enter its final judgment upon such issue on January 18, 1954, awarding to the said Virginia Electric and Power Company just compensation for the taking of the power company's easement the sum of Sixty-one Thousand Six Hundred Dollars ($61,600.00) exclusive of interest.

(4). That thereafter the United States of America appealed the judgment and final order aforesaid to the United States Court of Appeals for the Fourth Circuit which Court by decision appearing in 218 F. 2d 524 dated January 5, 1955, affirmed the said judgment and final order aforesaid.

(5). That thereafter the United States of America petitioned the Supreme Court of the United States for writ of certiorari to the United States Court of Appeals for the Fourth Circuit; whereupon the Supreme Court of the United States granted the same, vacated the judgment and remanded the case to the said Court of Appeals for further consideration in the light of the decision in *United States* v. *Twin City Power Co.*, 350 U.S. 222, 350 U.S. 956, January 30, 1956.

(6). That thereafter, the United States Court of Appeals for the Fourth Circuit issued its decision, 235 F. 2. 327, on July 31, 1956, vacating the judgment and remanding the case to this Court with directions to award to the power company as compensation for the taking of the easement condemned by the government the difference between the value of the land with and without the servitude of the easement, excluding from the valuation in both instances any

element of value arising from the availability of the land for water power purposes due to its being situate on a navigable stream.

(7). That thereafter, the United States of America petitioned the United States Court of Appeals for the Fourth Circuit for rehearing which that Court denied on September 11, 1956, 237 F. 2d 165.

(8). That thereafter this matter was returned to this Court by mandate of United States Court of Appeals for the Fourth Circuit with directions to proceed in accordance with the decisions of that Court, whereupon on September 24, 1956, this Court entered its order that further appropriate proceedings herein be had to award to Virginia Electric and Power Company compensation in conformity to the provisions of the aforesaid judgment of said appellate Court.

(9). That the Court overruled the motion of the United States of America for a trial by jury, to which the United States of America excepted, and upon motion of the said Virginia Electric and Power Company, the Court appointed three disinterested freeholders, agreed upon by the parties, as commissioners to determine the following inquiries:

> FIRST: What is the difference between the fair market value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, over the land in Tract FF-3100E up to contour 330, involving 1840 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?
>
> SECOND: What is the difference between the fair mar-

ket value of the Falkland Tract, consisting of 7400 acres, with and without the servitude of the Government's easement, as described in Exhibit B hereto attached, assuming for the purpose of this inquiry that said easement is over the land in Tract FF-3100E up to contour 321 only, involving 1540 acres, determined as of October 23, 1952, excluding from both of such valuations any element of value arising from the availability of such land for water power purposes due to its being situate on a navigable stream?

* * *

[NOTE: The recital of the Third and Fourth Inquiries submitted to the commission may be found in U. S. App. 182.]

(10). That the said commissioners met at Halifax Courthouse, Virginia, on June 2, 1958, June 3, 1958, and June 9, 1958; viewed the said Tract FF-3100E and the "Falkland Estate" of which the said tract is a part, heard the testimony of witnesses, of Virginia Electric and Power Company, the United States of America having declined to produce any evidence of value, received exhibits and heard argument of counsel.

(11). That the said commissioners filed their report dated June 9, 1958 in this cause on June 19, 1958, answering the inquiries aforesaid as follows:

I. Answer: $70,920.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the First Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $525,-

080.00; accordingly the sum of $70,920 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the Government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated it would not object), we report that in our judgment such damages amount to $11,120.00.

II. Answer: $65,520.00.

In accordance with the directions and instructions of the Court, the commission is of the opinion and does ascertain that in the circumstances involved in the Second Inquiry, the fair market value of the Falkland Tract before the taking on October 23, 1952, was $596,000.00 and its value on said date after the taking was $530,480.00, accordingly the sum of $65,520.00 will be the just compensation, including all damages to the owner or owners of the adjacent or remaining property by reason of the acquisition of the aforesaid easement by the United States and converting it to its uses, as aforesaid, beyond the peculiar benefits that will accrue to such land from said acquisition and use by the United States. At the request of the government that we should set forth in our report what portion of the just compensation represents damages to the residue (to which request defendant's counsel stated they would not object), we report that in our judgment such damages amount to $11,720.00.

* * *

[NOTE: The recital of the commission's answers and findings with respect to the Third and Fourth Inquiries may be found in U. S. App. 184-185.]

(12). That Olive Vaughan Williams, a defendant herein, has stated in open court by her counsel, James S. Easley, that she is asserting no claim to any of the compensation which might be awarded herein other than the $1.00 which has already been paid her.

(13). The opinion of the United States Court of Appeals for the Fourth* Circuit, 235 F. 2d 327, reads:

> "If Mrs. Williams were the owner of the entire interest in the land, no one would contend that she would not be entitled to compensation for the condemnation of flowage rights by the government. Where these flowage rights have been conveyed to another, there is no reason in law, in equity, in good conscience or in common honesty why the compensation to which she would otherwise have been entitled should not be paid to one to whom such rights have been conveyed."

The rights of Virginia Electric and Power Company included the right to flood 1540 acres of the "Falkland" tract of approximately 7400 acres. When those rights were originally conveyed any damages to the residue of the land were included in the compensation paid. When the government's easement is imposed upon these same 1540 acres, the residue of the "Falkland" tract is damaged and therefore, if the ownership were in one person the compensation for the taking over these 1540 acres would include damages to the residue. The appellate Court has already decided that this compensation shall be determined and then awarded to Virginia Electric and Power Company. Therefore the issue

* Misquoted, U. S. App. 185.

which the United States now seeks to inject in the case by its aforesaid motion and offer of proof is not within the scope of the direction of the Court of Appeals.

It is therefore, adjudged and ordered by the Court:

(1). After careful consideration of the Report of the Commissioners, their Findings of Fact and the testimony and evidence in the case, it is the Court's opinion that the Report of the Commissioners and their Findings of Fact should be confirmed and adopted by the Court.

(2). After hearing further evidence on behalf of both parties and arguments of counsel, the Motion of the United States of America to Exclude Damages to Residue is overruled and the United States of America has excepted.

(3). The Court holds the Second Inquiry of the order appointing commissioners as the appropriate measure of compensation as directed by the United States Court of Appeals for the Fourth Circuit, and adopts the findings of the commissioners on such inquiry.

(4). That the just compensation to be paid by the plaintiff, the United States of America for the taking of the full, complete and perpetual right, power and privilege to overflow, permanently or intermittently, as may be necessary as a result of the construction, maintenance and operation of the John H. Kerr Dam and Reservoir, as described in the Declaration of Taking heretofore filed in this cause, shall be the sum of Sixty-five Thousand Five Hundred and Twenty Dollars ($65,520.00), exclusive of interest, and that said sum, with interest upon Sixty-five Thousand Five Hundred and Nineteen Dollars ($65,519.00) thereof from October 23, 1952, until the date of payment shall be deposited in the registry of this Court by the plaintiff, the United States of America; and

It is further ORDERED that upon receipt of the aforesaid

sum of Sixty-five Thousand Five Hundred and Nineteen Dollars ($65,519.00), with interest thereon as aforesaid, the clerk of this Court be, and he hereby is, authorized and directed to issue a check in the sum of Sixty-five Thousand Five Hundred and Twenty Dollars ($65,520.00), together with all of the interest paid as aforesaid, payable to the order of Virginia Electric and Power Company, and to mail the said check to said payee, as follows:

Virginia Electric and Power Company,
7th and Franklin Street,
Richmond, Virginia.

The clerk shall mail a certified copy of this order to the bank in which said fund is on deposit, which shall be the authority for said bank to pay the said check when presented.

It is further ADJUDGED and ORDERED that upon the payment and mailing of the aforesaid check that this judgment be, and it is hereby, satisfied.

It is further ORDERED that the clerk of this Court mail two certified copies of this order to Mr. Leigh B. Hanes, Jr., Assistant United States Attorney, P. O. Box 601, Lynchburg, Virginia; and three copies to Mr. Ralph H. Ferrell, Jr., care Hunton, Williams, Gay, Moore and Powell, Electric Building, Richmond, Virginia.

November 24, 1958.

JOHN PAUL,
District Judge.

A true copy, Teste:

CLARENCE E. GENTRY,
Clerk.

by: GRACE A. HARPER,
Deputy Clerk.